In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 843

LEE ROY LEACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 402 F.2d 268. The opinion of the district court appears in the record at pages 396 to 405.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1968. On November 21, 1968, Mr. Justice Black extended the time for filing a petition

for a writ of certiorari to December 16, 1968, reserving the question of timeliness of the application, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to grant a mistrial at the close of the government's evidence, when it dismissed a conspiracy count and granted a severance to petitioner's co-defendant.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted of knowingly possessing 543 gallons of non-taxpaid liquor, in violation of 26 U.S.C. 5604(a)(1). He was sentenced to imprisonment for two years, eighteen months of which was suspended as provided in 18 U.S.C. 3651 (R. 362-366, 414-415). The court of appeals affirmed.

The evidence at trial showed that on January 10, 1967, petitioner called the deputy sheriff of Winston County, Mississippi, to report that someone was stealing his whisky. Accompanied by a highway patrolman, the deputy met petitioner at a place about a half-mile from the latter's house. Petitioner and another man were armed and guarding a dead[illegible]nd road leading down into the woods. Petitioner said that he had blocked in some men named Fredericks and had possibly hit one of the boys in the car (R. 87-90). The officers, after going down the road a short dis-

tance and finding an abandoned car, told petitioner he would have to make out papers before they could proceed further. Petitioner said that he might have to pay a whisky fine but he was going to stop the Fredericks, who were stealing whisky from his main stash (R. 90-93).[1]

On the following day an agent of the Alcohol and Tobacco Tax Unit made an investigation of premises in the neighborhood of petitioner's farm. He found three stashes of non-taxpaid whisky, totaling 543 gallons, at distances of ten to twenty yards from petitioner's north property line. There were well-defined paths from petitioner's property leading to the stashes and the only vehicular access led by petitioner's barn (R. 123-140).

On February 3, 1967, the federal officers seized an illicit still on land adjoining petitioner's property, situated about one-half mile from petitioner's house. They saw co-defendant Thrasher at a distance of about forty yards from the still, walking toward it. Thrasher took flight, but was caught and arrested (R. 118-119, 141-146). Fingerprints on bottles at the still site corresponded with those of Thrasher (R. 158-162, 218-225).

At the conclusion of the government's case, the trial judge made rulings which limited the issues to count 2, charging petitioner with possession of 543 gallons of non-taxpaid liquor. A severance was granted as to Thrasher who was named as co-defendant

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[1] A week later, petitioner was in the office of the deputy sheriff and said that "it was too bad to get out and make whisky and let somebody else steal it from you" (R. 53).

in a conspiracy count and charged with several substantive offenses.[2]

ARGUMENT

Although a trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice should appear, dismissal of a conspiracy count does not necessarily establish prejudice. *Schaffer* v. *United States*, 362 U.S. 511, 516. The trial court here, "out of an abundance of caution" (R. 400-401), granted a severance to co-defendant Thrasher, who conceivably could have been prejudiced by petitioner's unusually frank admissions and by the fact that count 3, which charged both defendants jointly with operation of an illicit still, was left standing against Thrasher. There was nothing in the evidence relating to Thrasher, however, which, by admission or otherwise, tended to prejudice petitioner. In view of the simple factual situation, the severance of Thrasher and the clear instructions to disregard all evidence relating to Thrasher or the still, the court acted within its sound discretion in refusing to grant a mistrial to petitioner. *United States* v. *Branker*, 395 F. 2d 881, 887 (C.A.

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[2] Motions for judgment of acquittal by both defendants were ruled on as follows: Count 1, conspiracy, sustained; count 2, possession by petitioner of non-taxpaid whisky, denied; count 3, possession and control of an unregistered still by both defendants, motion sustained as to petitioner, denied as to Thrasher; counts 4, 5 and 6, substantive charges against Thrasher, denied; count 7, substantive charge against Thrasher, sustained. Motions for mistrial and severance were sustained as to Thrasher and denied as to petitioner (R. 245-254, 271-273).

2); *United States* v. *Elgisser*, 334 F. 2d 103 (C.A. 2), certiorari denied *sub nom. Gladstein* v. *United States*, 379 U.S. 879; *United States* v. *Manfredi*, 275 F. 2d 588, 593 (C.A. 2), certiorari denied, 363 U.S. 828; *United States* v. *James*, 378 F. 2d 88, 91 (C.A. 6); *United States* v. *Morgan*, 394 F. 2d 973 (C.A. 6), certiorari denied, November 12, 1968, *sub nom. DeFoe* v. *United States*, No. 444 Misc., O.T. 1968; *United States* v. *Jordan*, 399 F. 2d 610, 615 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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